

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

**IN RE: AQUEOUS FILM-FORMING FOAMS
PRODUCTS LIABILITY LITIGATION**

MDL No. 2873

ORDER DENYING TRANSFER

Before the Panel:* Defendants E.I. du Pont de Nemours and Company, The Chemours Company, and The Chemours Company FC, LLC, move under 28 U.S.C. § 1407(c) to transfer the *Aqua North Carolina* action listed on Schedule A to the District of South Carolina for inclusion in MDL No. 2873. Plaintiff opposes the motion.

MDL No. 2873 involves allegations that aqueous film-forming foams (AFFFs) used at airports, military bases, or other locations to extinguish liquid fuel fires caused the release of perfluorooctane sulfonate (PFOS) and/or perfluorooctanoic acid (PFOA; collectively, these and other per- or polyfluoroalkyl substances are referred to as PFAS) into local groundwater and contaminated drinking water supplies. Plaintiff’s claims in *Aqua North Carolina* relate to a manufacturing facility called the Fayetteville Works that allegedly produced a variety of films and specialty chemicals. According to the complaint, among these chemicals was PFAS—primarily, but not exclusively, an ammonium salt of hexafluoropropylene oxide dimer acid known as “GenX”—that plaintiff alleges was discharged into the Cape Fear River and contaminated plaintiff’s water supply. On its face, plaintiff’s complaint does not involve allegations pertaining to the manufacture, use, or disposal of AFFFs.

In support of its motion to transfer, defendants argue that *Aqua North Carolina*, in fact, is an “AFFF action.” More specifically, defendants contend that plaintiff’s claims are duplicative of those in a separate action brought by plaintiff in the MDL that explicitly seeks compensation for contamination caused by PFAS in AFFF products. Defendants further argue that other cases pending in the MDL relating to potential AFFF contamination sites in North Carolina demonstrate that AFFF issues will pervade this litigation regardless of plaintiff’s attempt to cabin its complaint to discharges from the Fayetteville Works. Defendants argue that AFFF is a potential source of the PFAS contamination alleged in the plaintiff’s complaint and, therefore, *Aqua North Carolina* will involve factual questions relating to PFAS and AFFF that are shared by the actions pending in MDL No. 2873.

* Judge David C. Norton did not participate in the decision of this matter.

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When we centralized this docket, we denied a motion by 3M Company to extend the scope of the MDL to encompass not just cases involving AFFFs, but all cases relating to 3M's manufacture, management, disposal, and sale of PFAS. *See In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, 357 F. Supp. 3d 1391, 1396 (J.P.M.L. 2018). We drew this line between “AFFF” and “non-AFFF” cases because of concerns for the manageability of this litigation:

While a non-AFFF MDL would allow for common discovery and motion practice with respect to 3M—the main producer of PFOA and PFOS—it also would include far more site-specific issues, different modes of PFAS contamination, and different PFAS chemicals (whereas the AFFF actions are limited to PFOA and PFOS contamination). Such an MDL could quickly become unwieldy.

Id. Since then, we have endeavored to maintain this distinction. For instance, we denied a motion to transfer eight Eastern District of New York actions brought by water authorities seeking damages arising from alleged PFAS contamination of groundwater, in which movants similarly argued that the actions were properly construed as AFFF actions. *See Order Denying Transfer*, MDL No. 2873 (J.P.M.L. Mar. 27, 2020), ECF No. 620. In denying the motion to transfer, we stated:

[W]e have no desire to unnecessarily complicate the transferee judge's task in efficiently managing this litigation, which already involves a wide range of claims and parties. Given our continued concern about the manageability of this litigation, *a party seeking transfer of an action that does not on its face raise AFFF claims bears a significant burden to persuade us that transfer is appropriate and will not undermine the efficient progress of the AFFF MDL.*

Id. at 2 (quoting *Order Denying Transfer* at 2, MDL No. 2873 (J.P.M.L. Dec. 18, 2019), ECF No. 541) (emphasis in original).

Defendants have not met the “significant burden” of showing that transfer of *Aqua North Carolina* is appropriate. Plaintiff's complaint is focused on the operations at defendants' Fayetteville Works facility and, primarily, on the discharge of “GenX,” a PFAS compound not used in AFFF products. We generally have excluded actions involving non-AFFF discharges of PFAS from specific industrial locations. *See, e.g., In re AFFF*, 357 F. Supp. 3d at 1396 (excluding non-AFFF actions involving alleged industrial discharges into the Tennessee River, alleged contamination originating from a shoe manufacturer's industrial waste, and alleged PFAS discharges from factories in Hoosick Falls, New York); *Order Denying Transfer* at 2–3, MDL No. 2873 (J.P.M.L. Apr. 5, 2022), ECF No. 1352 (denying transfer of an action involving PFAS discharges from carpet manufacturers in Dalton, Georgia); *Order Denying Transfer* at 2–3, MDL No. 2873 (J.P.M.L. Aug. 3, 2022), ECF No. 1510 (denying transfer of action involving PFAS discharges from 3M manufacturing facility in Cordova, Illinois).

We are not persuaded that plaintiff's maintenance of separate AFFF and non-AFFF actions here is clearly untenable. *Cf. Transfer Order* at 3–4, MDL No. 2873 (J.P.M.L. Jun 7, 2021), ECF No. 1020 (transfer appropriate where plaintiff had identified common contamination sites in both

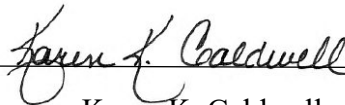
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its “AFFF” and “non-AFFF” complaints). The complaint here involves a single non-AFFF source of PFAS, which is not at issue in plaintiff’s separate AFFF complaint. The mere potential for commingling of PFAS from AFFF and non-AFFF sources, standing alone, is not sufficient for transfer. *See* Transfer Order at 2–3, MDL No. 2873 (J.P.M.L. Aug. 3, 2022), ECF No. 1511 (“A more obvious overlap between the State’s AFFF and non-AFFF actions is necessary to warrant transfer of the State’s non-AFFF action to the MDL.”).

Accordingly, after considering the parties’ arguments, we find that transfer of the action listed on Schedule A under 28 U.S.C. § 1407 will not serve the convenience of the parties and witnesses or promote the just and efficient conduct of the litigation. To be clear, we do not foreclose the possibility that discovery and pleading practice could demonstrate that an ostensibly non-AFFF action is, in fact, more properly treated as an AFFF case for which transfer to MDL No. 2873 is warranted. But, based upon consideration of the pleadings and the record, it must appear that AFFF claims are substantial and concrete, and that transfer to the MDL will enhance efficiency and convenience, both in the individual action and in the MDL overall. Should *Aqua North Carolina* evolve into a more obvious AFFF action, the parties or the court at that time can re-notice *Aqua North Carolina* as a potential tag-along in MDL No. 2873. Any overlap between *Aqua North Carolina* and the actions pending in the MDL, however, remains too uncertain to support transfer.

IT IS THEREFORE ORDERED that the motion to transfer the action listed on Schedule A to MDL No. 2873 is denied.

PANEL ON MULTIDISTRICT LITIGATION



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Chair

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Madeline Cox Arleo

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**IN RE: AQUEOUS FILM-FORMING FOAMS
PRODUCTS LIABILITY LITIGATION**

MDL No. 2873

SCHEDULE A

Eastern District of North Carolina

AQUA NORTH CAROLINA, INC. v. DOWDUPONT, INC., ET AL.,
C.A. No. 7:23-00016